84-597

Office-Supreme Court, U.S.
FILED
OCT 12 1984
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM B. CHAPMAN,
Petitioner

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, UNITED STATES CIVIL SERVICE COMMISSION, ALAN CHAMPBELL, Chairman, U.S. Civil Service Commission, JULE SUGARMAN, Commissioner, ERSA POSTON, Commissioner, ROBERT A. FROSCH, Administrator,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

SOLICITOR GENERAL OF THE UNITED STATES
Department of Jutsice
Washington, D.C. 20530

Counsel for the Respondents

CURTIS C. MASON
Attorney at Law
229 Pine Valley
Huntsville, TX 77340
409/295-6663

Counsel of Record for WILLIAM B. CHAPMAN, Petitioner

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

41 pp

QUESTIONS PRESENTED FOR REVIEW

I. When the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) found that the district court properly dismissed the claim under the Administrative Procedure Act (5 U.S.C. §§ 702 et seq.) for lack of jurisdiction, did this sanction a lower court decision that was in conflict with decisions of other federal courts of appeals and with applicable decisions of this Court?

II. In finding that the violation of the Privacy Act (5 U.S.C. § 552a) was neither intentional nor willful, did the Fifth Circuit use the criminal definition of intentional or willful rather than the civil definition, and if so, was this decision in conflict with other federal courts of appeals, the intent of Congress and applicable decisions of this Court?

III. When the Fifth Circuit speculated that without the benefit of a previous court opinion directly on point, NASA personnel could have reasonably thought they were not violating the Privacy Act, did this speculation place such a chilling effect on future plaintiffs that it will nullify Congressional intent that there be private enforcement of the act and did this speculation depart so far from the usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	1
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
Statement of Facts	4
Proceedings In Courts Below	5
The Fifth Circuit Rendered Decisions That Were In Conflict With Decisions Of This Court And Other Courts Of Appeals And Departed So Far From The Usual Course Of Judicial Proceedings As To Call For This Court's Power Of Supervision.	6
Chapman's Administrative Procedure Act claim should not have been dismissed for lack of jurisdiction...	6
The Fifth Circuit held Chapman to too harsh a standard for proving a willful or intentional violation.	9
By speculating on what NASA personnel could have thought in the absence of an opinion directly on point, the Fifth Circuit has placed a chilling effect on private enforcement of the Privacy Act.	11
CONCLUSION	13

APPENDICES

APPENDIX A (Opinion of Fifth Circuit in Chapman I).	1a
APPENDIX B (Opinion of Fifth Circuit in Chapman II)	10a
APPENDIX C (Order of Fifth Circuit denying Chapman's motion for rehearing)	19a
APPENDIX D (Memorandum and Order of District Court dismissing Administrative Procedure Act claim)	20a

TABLE OF AUTHORITIES

CASES	Page
Albert v. Chafee, 571 F.2d 1063 (9th Cir. 1977)	6
Alverez v. Longboy, 697 F.2d 1333 (9th Cir. 1983)	11
Brown v. General Services Administration, 425 U.S. 820 (1976)	7, 8
Bruce v. United States, 621 F.2d 914 (8th Cir. 1980)	9
Califano v. Sanders, 430 U.S. 99 (1977)	6
Chapman v. National Aeronautics and Space Admin., 682 F.2d 526 (5th Cir. 1982)	2, 4, 5, 8, 11, 12, 13
Chapman v. National Aeronautics and Space Admin., 736 F.2d 238 (5th Cir. 1984)	2, 5, 9, 10, 11, 12, 13
DeLaFuente v. Stokely-Van Camp, Inc., 713 F.2d 255 (7th Cir. 1983)	10, 11
Doe v. Hampton, 566 F.2d 265 (D.C. Cir. 1977)	6
Edison v. Dept. of the Army, 672 F.2d 840 (11th Cir. 1982)	9
Great Am. Federal Savings and Loan Ass'n. v. Novotny, 442 U.S. 366 (1979)	8
Hill v. United States, 571 F.2d 1098 (9th Cir. 1978)	6
Koden v. United States Dept. of Justice, 564 F.2d 228 (7th Cir. 1977)	10
National Steel etc. v. Occupational S & HR Comm., 607 F.2d 311 (9th Cir. 1979)	10
Parks v. United States Internal Revenue Service, 618 F.2d 677 (10th Cir. 1980)	9
Ray v. Nimmo, 704 F.2d 1480 (11th Cir. 1983)	8
Rivera v. Adams Packing Ass'n, Inc., 707 F.2d 1278 (11th Cir. 1983)	11
Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972)	11
Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982)	8
United States v. Illinois Central Ry., 303 U.S. 239 (1938)	10
United States v. Murdock, 290 U.S. 389 (1933)	10
Walker v. Washington, 627 F.2d 541 (D.C. Cir. 1980) Cert. den. 449 U.S. 994 (1980)	6, 7
Wehr v. Burrough Corp., 619 F.2d 276 (3rd Cir. 1980)	10
Wiggins v. United States Postal Service, 653 F.2d 219 (5th Cir. 1981)	7, 8

Page

LEGISLATIVE HISTORY

Joint House - Senate Report on the Privacy Act, 120 Cong. Rec. H. 40881, 40882 (1974) 9
Senate Report No. 93-1183 reprinted in U.S. Code Cong. and Admin. News, 93rd Congress Second Session 6916 (1974) 11, 12
Senate Report No. 95-969 reprinted in U.S. Code Cong. and Admin. News, 95th Congress Second Session 2723 (1978) 6

STATUTES

Administrative Procedure Act, 5 U.S.C. § 702 ..... 3, 5
Amendment to Pleadings to Show Jurisdiction, 28 U.S.C. § 1653 ..... 3, 8
Federal Question, 28 U.S.C. § 1331 ..... 3, 6, 7
Privacy Act, 5 U.S.C. § 552a(g)(4) 2

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM B. CHAPMAN,
Petitioner

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, UNITED STATES CIVIL SERVICE COMMISSION, ALAN CHAMPBELL, Chairman, U.S. Civil Service Commission, JULE SUGARMAN, Commissioner, ERSA POSTON, Commissioner, ROBERT A. FROSCH, Administrator,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit (Fifth Circuit), which appear in Appendix A and Appendix B were reported as follows: *Chap-*

man v. National Aeronautics and Space Administration et al (*Chapman I*), 682 F.2d 526 (5th Cir. 1982), and *Chapman v. National Aeronautics and Space Administration et al* (*Chapman II*), 736 F.2d 238 (5th Cir. 1984).

JURISDICTIONAL STATEMENT

This is a petition for writ of certiorari to the Fifth Circuit from two decisions, the first, Appeal No. 81-2324 an interlocutory decision, was entered on August 13, 1982, with petition for rehearing by the United States denied on November 12, 1982, and the second, Appeal No. 84-2058 a final decision, was entered on July 16, 1984, with petition for rehearing by Chapman denied on August 15, 1984. (Appendix C). This petition for writ of certiorari is being filed within 90 days of the denial of Chapman's petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) which grants jurisdiction to this Court to review cases in the courts of appeals by writ of certiorari.

STATUTES INVOLVED

5 U.S.C. § 552a(g)(4) Privacy Act

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
>
> (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. §§ 701 et seq. Administrative Procedure Act

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1653. Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

STATEMENT OF THE CASE

Statement of Facts:

In August 1977, William B. Chapman, a 50 year old scientist specializing in geophysics was discharged by NASA for failure to follow administrative instructions and for other unsatisfactory job performance. His immediate supervisor, William C. Phinney, wrote numerous memoranda about Chapman and his job performance, spanning the period June 1975 through June 1977. Each memorandum was written shortly after meetings with Chapman. For the first 22 months the memoranda were kept private and were available only to Phinney. During April 1977, Phinney delivered his private notes to Robert Hall, Personnel Management Specialist at NASA. Unbeknownst to Chapman, the memoranda were placed in his administrative file. On July 6, 1977, Chapman received notice of an impending removal action and was informed that the file against him was available for inspection. This file consisted entirely of Phinney's memoranda and attachments thereto. Phinney's notes played a part in Chapman's discharge. (*Chapman I*, 682 F.2d at 527, Appendix A p. 2a).

Chapman appealed his discharge to the United States Civil Service Commission alleging 28 grounds for reversal. Among those grounds for reversal one ground involved age and sex discrimination and one involved the Privacy Act. The remaining grounds involved procedural errors, failure of NASA to follow its own rules, factual errors, and disproportionate treatment. After a hearing, the Civil Service Commission affirmed Chapman's discharge in an opinion dated July 6, 1978.

Proceedings in the Courts Below:

August 10, 1978; Chapman filed his original complaint, Civil Action No. H78-1539, alleging claims and jurisdiction based on age, 29 U.S.C. § 633a, and sex, 42 U.S.C. § 2000e-16, discrimination; a claim under the Privacy Act, 5 U.S.C. § 552a and that the findings of the Civil Service Commission should be reviewed under 5 U.S.C. § 702 of the Administrative Procedure Act. On February 6, 1980, the district court dismissed the claim under the Administrative Procedure Act for lack of jurisdiction. Leave to amend the jurisdictional statement was not granted by either the district court or the Fifth Circuit. (*Id.* at 530, Appendix A p. 9a and Appendix D p. 22a). A jury rejected the age discrimination claim and the district court rejected the sex discrimination and Privacy Act claims. (*Id.* at 527, Appendix A p. 2a). On the initial appeal, the Fifth Circuit reversed the district court on the Privacy Act claim and affirmed on the other claims. Upon remand the district court, without holding any further evidentiary hearing, made additional findings of fact to the effect that intentional or willful conduct by NASA had not been proved and entered judgment for NASA. Appeal was again taken to the Fifth Circuit which in *Chapman II*, affirmed the district court. (736 F.2d at 243, Appendix B p. 18a).

THE FIFTH CIRCUIT RENDERED DECISIONS THAT WERE IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND DEPARTED SO FAR FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THIS COURT'S POWER OF SUPERVISION

Chapman's Administrative Procedure Act Claim Should not Have Been Dismissed for Lack of Jurisdiction:

Chapman's original complaint stated a claim under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq., as well as age and sex discrimination and Privacy Act claims. Prior to the effective date of the Civil Service Reform Act of 1978 actions of the Civil Service Commission were reviewable in the District Courts with the Administrative Procedure Act providing a waiver of sovereign immunity *Hill v. United States,* 571 F.2d 1098, 1102 (9th Cir. 1978) see also *Walker v. Washington,* 627 F.2d 541, 544 (D.C. Cir. 1980, *cert. denied* 449 U.S. 994 (1980), *Albert v. Chafee,* 571 F.2d 1063, 1064 (9th Cir. 1977), *Doe v. Hampton,* 566 F.2d 265, 267 (D.C. Cir. 1977), Senate Report No. 95-969 on the Civil Service Reform Act of 1978, reprinted in U.S. Code Cong. and Admin. News, 95th Cong. 2nd Session 2723, 2784 - 2786, and 28 U.S.C. § 1331 providing jurisdiction in the district courts. *Califano v. Sanders,* 430 U.S. 99 (1977), see also *Walker v. Washington, supra, Albert v. Chafee, supra,* and *Doe v. Hampton, supra.* After the effective date of the Civil Service Reform Act of 1978, jurisdiction to review federal personnel actions was in the Court of Claims and Courts of Appeals. This change did not

apply to personnel actions taken before the effective date of the Act. *Walker v. Washington,* 627 F.2d at 544 n. 4. Had Chapman's complaint contained only the Administrative Procedure Act claim, the district court clearly had jurisdiction under 28 U.S.C. § 1331. However, the original complaint did not allege 28 U.S.C. § 1331 as the basis of jurisdiction.

In Chapman's memorandum in opposition to NASA's motion to dismiss 28 U.S.C. § 1331 was mentioned as the basis for jurisdiction in the district court. Rather than granting leave to amend the jurisdiction statement the district court dismissed the Administrative Procedure Act Claim on the authority of *Brown v. General Services Admin.,* 425 U.S. 820 (1976) holding, ". . . , review of the Civil Service Commission's Findings is neither necessary or appropriate herein and this court has no jurisdiction to do so under the Administrative Procedure Act because there exists 'an adequate remedy in a court' for the grievances of the Plaintiff" (Appendix D p. 21a). Had Chapman's appeal to the Civil Service Commission been based exclusively on age and sex discrimination and violation of the Privacy Act, *Brown v. General Services Administration* would have been directly on point and the holding of the district court would have been correct.

An examination of the attachments to the original complaint will show that age and sex discrimination and violation of the Privacy Act were only three of a total of 28 points of error contained in the appeal to the Civil Service Commission. In *Wiggins v. United States Postal Serv.,* the Fifth Circuit recognized that under the Civil Service Reform Act of 1984, one can challenge the procedures under which one has been dismissed and in the same action allege discrimination based on handicap.

653 F.2d 219 (5th Cir. 1981). In such a case the Fifth Circuit found that the district court had jurisdiction of both claims. At least two other circuits have held that if a complaint involves two independent claims one of which is based on discrimination and the other is not, *Brown v. General Services Administration, supra,* would not apply and the plaintiff is entitled to pursue both claims. In *Ray v. Nimmo,* the Eleventh Circuit held that the plaintiff could pursue both an age discrimination claim and a Fifth Amendment claim that was based on failure to follow agency rules. 704 F.2d 1480, 1485 (11th Cir. 1983). In *Thompson v. Sawyer,* the D.C. Circuit held that a plaintiff could pursue both an Equal Pay Act claim and a sex discrimination claim. 678 F.2d 257 (D.C. Cir. 1982). The above opinions are consistent with this Court's discussion in *Great Am. Federal Savings and Loan Ass'n. v. Novotny* where this Court recognized that when a case involved two independent rights, *Brown v. GSA* did not apply. 442 U.S. 366, 378 (1979).

In the initial appeal of this case to the Fifth Circuit, Chapman, in his reply brief, pointed out that under 28 U.S.C. § 1653 defective jurisdictional statements may be amended in both the trial and appellate courts. It was then argued either the cause should be remanded with leave being granted to amend the jurisdictional statement or else leave should be granted to amend the jurisdictional statement in the Fifth Circuit. Leave was not granted and the Fifth Circuit held that the district court properly dismissed the Administrative Procedure Act claim (*supra* at 530, Appendix A p. 9a). By so doing, the Fifth Circuit has rendered a decision that is in conflict with decisions of other circuits and with applicable decisions of this Court.

The Fifth Circuit Held Chapman to too Harsh a Standard for Proving a Willful or Intentional Violation:

Legislative history of the Privacy Act reveals that Congress did not intend to hold an individual to the highest standard of proof in order to recover damages. The report that accompanied the compromise version of the Act stated,

> In a suit for damages, the amendment reflects a belief that a finding of willful, arbitrary, or capricious action is too harsh a standard of proof for an individual to exercise the rights granted by this legislation. Thus the standard for recovery of damages was reduced to "willful or intentional" action by an agency. On a continuum between negligence and the very high standard of willful, arbitrary, or capricious conduct, this standard is viewed as only somewhat greater than gross negligence.

120 Cong. Rec. H. 40881, 40882 (1974); see also *Edison v. Dept. of the Army,* 672 F.2d 840, 846 (11th Cir. 1982), *Bruce v. United States,* 621 F.2d 914, 917 n. 6 (8th Cir. 1980), *Parks v. Internal Revenue Service,* 618 F.2d 677, 683 (10th Cir. 1980).

The Fifth Circuit found that the supervisor's withholding his memoranda from incorporation in a system of records for almost two years may call into question the district court's holding there was no evidence of intentional or willful action. (*Chapman II,* 736 F.2d at 242, Appendix B p. 16a). The Fifth Circuit then speculated on what NASA personnel reasonably could have thought and then concluded that no willful or intentional violation was proved because, "Chapman has adduced no further

evidence that his supervisor's failure to give the memoranda to the personnel supervisor immediately after writing them was inexcusable oversight, or that the supervisor had any unlawful intent of ulterior motive in keeping his memoranda private." (*Id.* at 243, Appendix B p. 17a). By requiring Chapman to prove inexcusable oversight, unlawful intent or ulterior motive the Fifth Circuit has held Chapman to the harshest of standards of proof. This is contrary to the intent of Congress as shown by the legislative history quoted above.

This Court has long recognized that the term willful had a different meaning when used in a civil statute than when used in a criminal statute. *United States v. Murdock* discussed the term willful stating, "But, when used in a criminal statute, it generally means an act done with a bad purpose, [citations omitted] without justifiable excuse, [citations omitted] stubbornly, obstinately, perversely [citations omitted]." 290 U.S. 389, 394 (1933). By requiring Chapman to show inexcusable oversight, unlawful intent or ulterior motive the Fifth Circuit has held Chapman to the Criminal definition of willful. By contrast in a civil statute where willful conduct must be proved prior to assessing a penalty the term means the actions of one who having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. *United States v. Illinois Central R.*, 303 U.S. 239, 242-3 (1938), see also *Wehr v. Burroughs Corp.*, 619 F.2d 276, 281 (3rd Cir. 1980); *National Steel, etc. v. Occupational S. & H.R. Com'n.*, 607 F.2d 311, 314 (9th Cir. 1979), *Koden v. United States Dept. of Justice*, 564 F.2d 228, 234 (7th Cir. 1977). Likewise proof of an intentional violation of a civil statute does not require proof of a specific intent to violate the law. *DeLa*

Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 238 (7th Cir. 1983), *Rivera v. Adams Packing Ass'n, Inc.*, 707 F.2d 1278, 1283 (11th Cir. 1983), *Alvarez v. Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983), *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1006 (9th Cir. 1972).

In requiring Chapman to show inexcusable oversight, unlawful intent, or ulterior motive before recovering damages the Fifth Circuit has failed to follow the intent of Congress and the decision was in conflict with applicable decisions of this Court and other federal courts of appeal.

By Speculating on What NASA Personnel Could Have Thought in The Absence of an Opinion Directly on Point, the Fifth Circuit has Placed a Chilling Effect on Private Enforcement of the Privacy Act:

The Fifth Circuit found that: while Phinney's memoranda could not have been excused from the requirement of timely incorporation in a system of records, without the opinion in *Chapman I* NASA personnel reasonably could have thought incorporation at the time the adverse action was initiated was timely. (736 F.2d at 243, Appendix B p. 17a). In Senate Report No. 93-1183 on the Privacy Act, it was stated that strong criminal penalties for violation of the act was left out in favor of civil challenges of the Attorney General or of private citizens with real or suspected grievance or claims of violation of the Act. (Senate Report No. 93-1183 reprinted in U.S. Code Cong. and Adm'n. News, 93rd Congress Second Session 6916, 6943). Since the Act did not give any administrative body authority to ensure compliance, Congress in-

tended to encourage the widest possible citizen enforcement through the judicial process. (*Id.* at 6997).

The Fifth Circuit, by speculating that without *Chapman I*, NASA personnel could reasonably have thought the Privacy Act was not being violated, has placed a chilling effect on private enforcement of the Act. The message in *Chapman II* to any plaintiff contemplating private enforcement of the Privacy Act is that: unless there is a court opinion directly on point, even if you prove there was a violation of the Act, you will collect no damages and pay your own attorney fees. Congress in Senate Report No. 93-1183 recognized that, "Given the difficulties of time and resources, private enforcement through litigation is not likely to affect more than glaring violations of the Act." *Supra* at 6943. Although in *Chapman I* the Fifth Circuit found a glaring violation of the Act. *In Chapman II* the Fifth Circuit indulged in speculation that made recovery of damages impossible.

It should be noted that no where in *Chapman II* has the Fifth Circuit pointed to any evidence showing that NASA personnel actually thought Phinney's memoranda were being timely incorporated into a system of records so the Fifth Circuit's finding was based on pure speculation.

By indulging in speculation that places a chilling effect on Congressional intent for private enforcement of the Privacy Act the Fifth Circuit has departed so far from the usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

CONCLUSION

Because the Fifth Circuit has rendered a decision that is in conflict with applicable decisions of this Court and other federal courts of appeals and has departed so far from the usual course of judicial proceedings as to call for this Court's powers of supervision a Writ of Certiorari to the Fifth Circuit should be granted to review their decisions in *Chapman I* and *Chapman II*.

Respectfully submitted,

CURTIS C. MASON
Attorney at Law
229 Pine Valley
Huntsville, TX 77340
409/295-6663

Counsel of Record for
WILLIAM B. CHAPMAN,
Petitioner

APPENDIX A

William B. CHAPMAN,
Plaintiff-Appellant,

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, et al.,
Defendants-Appellees.

No. 81-2324.

United States Court of Appeals,
Fifth Circuit.

Aug. 13, 1982.

Rehearing Denied Nov. 12, 1982.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, POLITZ and RANDALL, Circuit Judges.

POLITZ, Circuit Judge:

Albeit simplified by the clarity of its factual display, this case presents a substantial legal issue, the resolution of which is neither aided nor hindered by a plethora of juristic expression. William B. Chapman, an employee of the National Aeronautics and Space Administration (NASA), at the Johnson Space Center, until his discharge on August 10, 1977, sued, urging age, 29 U.S.C. § 633a, and sex, 42 U.S.C. § 2000e-16, discrimination, and a claim under the Privacy Act of 1974, 5 U.S.C.

§ 552a. A jury rejected the age discrimination complaint and the court denied relief on the sex discrimination and the Privacy Act claims. We affirm the judgments of the jury and trial judge on the age and sex discrimination charges and reverse and remand for further consideration of the Privacy Act complaint.

The essential facts leading up to Chapman's discharge, and the predicate for the Privacy Act claim, are not disputed. Chapman was a 50 year old Space Scientist, specializing in geophysics, when his employment was terminated for failure to follow administrative instructions and for otherwise unsatisfactory job performance. His immediate supervisor, William C. Phinney, wrote numerous memoranda about Chapman and his job performance, spanning the period June 1975 through June 1977.[1] For the first 22 months, the notes apparently were kept private and were available only to Phinney. During April of 1977, Phinney delivered his private notes to Robert Hall, Personnel Management Specialist at NASA. Unbeknownst to Chapman, the memoranda were placed in his administrative file. On July 6, 1977, Chapman received notice of an impending removal action and was informed that the file against him was available for inspection. The Phinney notes played a part in Chapman's discharge.

The issue posited is whether the notes made and kept by Phinney were records maintained by NASA within the meaning of the Privacy Act, 5 U.S.C. § 552a. Several sections of the Act are particularly significant: the pre-

1. As noted by the trial judge in his findings of fact, "[t]hese handwritten notations are summaries of the meetings the author held with the Plaintiff in a supervisory capacity and contain the writer's appraisal of Plaintiff's job performance." In addition, "[e]ach memorandum was written immediately or shortly after the meeting it describes."

amble stating its purpose; section 552a(a)(4) defining "record"; section 552a(a)(5) defining "system of records"; section 552a(e)(1) limiting information maintained; sections 552a(e)(4)(C), (D), and (I) requiring publication of certain information about the records maintained; section 552a(e)(5) mandating fairness in record keeping procedures; and section 552a(g)(1)(C) prescribing civil remedies.

In the preamble to the Act, section 2(b)(2) of Pub.L. 93-579, Congress declared:

> The purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to . . . permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent;

Section 552a(a)(4) provides:

> the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.

Section 552a(a)(5) further provides:

> the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol,

> or other identifying particular assigned to the individual.

To insure the purpose of the Act, Congress provided in section 552a(e)(1):

> Each agency that maintains a system of records shall—maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President.

Under sections 552a(e)(4)(C), (D), and (I), an agency maintaining a system of records must publish in the Federal Register, at least annually, the categories of records, categories of users, purposes of use, routine uses, categories of sources, and other information about the records.

In the making and keeping of records, section 552a (e)(5) requires the agency to

> maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness to the individual in the determination.

Finally, section 552a(g)(1)(C) ordains that whenever any agency

> fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such

> record, and consequently a determination is made which is adverse to the individual; . . . the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

The trial court held that the Phinney memoranda made during 1975, 1976 and 1977 were not records under sections 552a(a)(4) and 552a(a)(5) and, accordingly, rejected the claim premised on section 552a(g)(1)(C). Although recognizing that the notes mentioned Chapman by name and directly related to his job performance, the district court found no Privacy Act violation on the grounds that NASA lacked control of the memoranda and the ability to retrieve the data. The trial court viewed Phinney's practice of keeping private notes as an efficient means of detailing "his meetings with [Chapman] over a two-year period [which] ironically protected [Chapman] from the errors a supervisor's total reliance on memory might create in such a situation."

We conclude that the Privacy Act does not prohibit taking and keeping private notes which may serve as valuable memory refreshers when supervisors are called upon periodically to evaluate an employee's job performance and work attitude. However, we are convinced that a redressable violation of the Act occurred in this case.

The Act enables an individual to prevent records obtained by an agency for a particular purpose from being used for any other purpose. In order for this statutorily created right to have meaning, the Act grants an individual access to pertinent information in the agency's system of records.

It is uncontroverted that the subject notes played a part in Chapman's discharge. We make neither a qualitative nor quantitative analysis of this use, confining ourselves to the observation that the notes in fact were involved in the decision to terminate Chapman's employment. From this use, it is apparent that, at least by July of 1977, NASA considered the notes to be part of its records which, under section 552a(e)(5), NASA was required to maintain "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual." When Phinney tendered his personal notes to Hall, for use by NASA in proceedings looking to the discharge of Chapman, the private aspect of the notes evanesced and they became subject to the requirements of the Privacy Act.

We agree that private note-taking offers a useful tool, aiding supervisors in recalling events when workers' evaluation reports or promotion or job assignment recommendations are being prepared. Used for these and similar legitimate purposes, notes equate with the maker's memory and are not proscribed by the Privacy Act. However, when notes bear negatively on a worker's employment status or situation, they must be handled in a manner consistent with the letter and spirit of the Privacy Act. Walking that narrow path is our task this day.

We cannot accept the district court's conclusion that "Chapman had an opportunity to refute or correct every aspect of the evidence the agency relied on in his removal." In reality, Chapman's opportunity to rebut the contents of Phinney's memoranda written, for example, in the summer of 1975, did not arise until July of 1977. During the interim, Chapman was not aware of the pri-

vate notes. Absent actual notice or some reference to the existence or contents of the notes in Chapman's personnel file it cannot be said that the records were fairly and properly maintained, for Chapman was not alerted timely to the existence of potentially derogatory data. Under section 552a(e)(5), NASA's use of the personal notes lacked, at the very minimum, the timeliness of incorporation into NASA records necessary to assure fairness.

The district court took cognizance of the frailty of humans in recollecting events long since passed by remarking that Phinney's notes "protected [Chapman] from the errors a supervisor's total reliance on memory might create in such a situation." We agree, but go one step further. Chapman was entitled to that same treatment. If Chapman had been apprised that his work performance was considered unsatisfactory and that notes containing specific details to support that evaluation were being chronicled, he would have had an opportunity to make his own refutatory notations. He could have sought supportive statements of co-workers and others and he could have provoked a review and resolution of the impending difficulty when the memories of all were fresher and more acute.

Every judge, every trial lawyer, and every trier of fact is aware that memories fade with the passage of time, witnesses become unavailable, and evidence disappears or deteriortates. Those simple realities, extant in most litigation, exist in the situation at bar.

We conclude that private notes may be made by supervisors, without violating the Privacy Act, if they are kept private. We further conclude that private notes subsequently may become part of the agency's records provided

they are placed timely in those records. A timely placement would be accomplished if a supervisor's private notes are incorporated in the agency's administrative records, either physically or by inclusion of the information contained therein, at the time of the next evaluation or report on the employee's work status or performance. Otherwise, the private notes must remain private, serving only to refresh the memory of the maker, and may not be included in the agency's records.

This rubric is designed to avoid a situation where an employee is misled and lulled into a false sense of security by being given satisfactory job performance ratings when supervisors are simultaneously and quietly collecting adverse data for later use. Such an "ambush" approach to the maintaining of records on employee job performance is not consistent with the Privacy Act.

During the period from June of 1975 until July of 1977, Chapman's job performance was evaluated periodically. The evaluations were included in his record and were available for his examination. These record references did not indicate inadequate job performance, in contrast to Phinney's notes which were maintained contemporaneously. Other than for preservation of recall, Phinney's notes should not have been used in Chapman's discharge process. The use made, with the force of official administrative records, violated the Privacy Act.

In addition to the foregoing, section 552a(e)(1) would bar the use made. Under section 552a(e)(4)(C), (D), and (I), the fact that private notes about individual members of the agency would be maintained and used to contradict public periodic evaluations would have to be disclosed by regular Federal Register publication if they

are to be properly maintainable as agency records. The agency has not indicated that any such publication was ever made.

We have examined, but find no merit in the other errors assigned by Chapman. The district court properly dismissed the claim asserted under the Administrative Procedure Act and committed no reversible error in excluding certain statistical evidence offered.

The decision of the district court on the Privacy Act claim is REVERSED and the matter is REMANDED for further proceedings consistent herewith. In all other respects, the judgment of the district court is AFFIRMED.

APPENDIX B

William B. CHAPMAN,
Plaintiff-Appellant,

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, et al.,
Defendant-Appellees.

No. 84-2058

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

July 16, 1984.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

We are the second panel of this court to hear an appeal by William B. Chapman challenging his discharge from employment with the National Aeronautics and Space Administration (NASA) in August of 1977. In a prior opinion, 682 F.2d 526 (5th Cir. 1982), this court reversed the district court's holding that a supervisor's handwritten memoranda were not "records" within the meaning of the Privacy Act of 1974, 5 U.S.C. § 552a. In this appeal Chapman asks us to hold that the "law of the case" doctrine required the district court on remand to

award him damages and precluded it from holding further hearings on factual issues. We hold that the "law of the case" doctrine does not apply to this case, and affirm the decision of the district court denying damages.

I.

William B. Chapman, the appellant, was a fifty-year-old space-scientist employed by NASA at the Johnson Space Center in August of 1977 when NASA discharged him for failure to follow administrative instructions and unsatisfactory job performance. From 1975 through 1977, his immediate supervisor privately kept handwritten memoranda about him. In April of 1977 the supervisor delivered the memoranda to the Personnel Management Specialist at NASA. These memoranda were placed in Chapman's file, unbeknownst to Chapman, and were influential in the August employment termination decision. Chapman discovered the memoranda when he inspected his file in July of 1977, after receiving notice of an impending removal action.

After his employment termination, Chapman filed a lawsuit, alleging age discrimination, 29 U.S.C. § 633a, sex discrimination, 42 U.S.C. § 2000e-16, and violation of the Privacy Act of 1974, 5 U.S.C. § 552a. A jury rejected the age discrimination claim, and the court rejected the sex discrimination claim. The court also rejected the Privacy Act claim on the basis that the supervisor's memoranda were not "records" within the meaning of the Privacy Act. 5 U.S.C. §§ 552a(a)(4) and 552a (a)(5). Chapman appealed, and this court affirmed the determinations in favor of NASA on the age and sex discrimination issues, but reversed the trial court's dis-

position of the Privacy Act issue. *Chapman v. NASA*, 682 F.2d 526, 527 (5th Cir. 1982).

In reversing the district court, this court concluded that "the Privacy Act does not prohibit taking and keeping private notes which may serve as valuable memory refreshers," but that "a redressable violation of the Act occurred in this case." *Id.* We specifically refused to make either "a qualitative" or a "quantitative" analysis of the role the supervisor's memoranda played in Chapman's discharge, except to observe that the memoranda "in fact were involved in the decision to terminate Chapman's employment." *Id.* at 528-29. We held that private notes may become part of the agency's official records, but only if they are placed in those records in a timely fashion. Finally, we said that "[a] timely placement would be accomplished if a supervisor's private notes are incorporated in the agency's administrative records, either physically or by inclusion of the information contained therein, at the time of the next evaluation or report on the employee's work status or performance." *Id.* at 529. We reversed and remanded the Privacy Act claim "for further proceedings consistent [t]herewith." *Id.* at 530.

On remand, the district court made further factual findings to determine whether Chapman should recover damages under the Privacy Act pursuant to 5 U.S.C. § 552a (g)(1)(C) or § 552a(g)(1)(D). Those sections allow a plaintiff to recover monetary damages from the government only if he first proves that the agency "acted in a manner which was intentional or willful." 5 U.S.C. § 552a (g)(4). *See also Perry v. Block*, 684 F.2d 121, 129 (D.C. Cir. 1982); *Edison v. Department of the Army*, 672 F.2d 840, 846 (11th Cir. 1982); *Parks v. IRS*, 618 F.2d 677, 683 (10th Cir. 1980). The district court

found that Chapman "neither pleaded nor prove[d] any intentional or willful actions by the agency" and therefore was "entitled to recover no damages at all." The district court also declined to award Chapman attorney fees.

Chapman appeals, urging that because the first opinion of this court said that there was a "redressable violation," the only appropriate action for the district court to take upon remand was to award damages. Chapman further urges that he both pleaded and proved willful and intentional conduct by NASA, and that he is entitled as a matter of law, to recover lost past and future wages as damages. He filed a motion for attorney's fees contemporaneously with his appeal. We hold that this court's first opinion in this case did not decide that Chapman was entitled to damages and that the "law of the case" doctrine did not foreclose the district court's subsequent factual hearings and decision to award no damages to Chapman. We further hold that the district court's determination that Chapman had not proved the government acted intentionally or willfully is not clearly erroneous, and therefore do not address the question whether Chapman should recover damages for lost wages. We also decline to award Chapman attorney fees.

II.

The "law of the case" doctrine, as it applies to this case,[1] operates to preclude a reexamination of issues of law decided on appeal, explicitly or by necessary impli-

1. The "law of the case" doctrine may have slightly different meanings depending upon the context in which it is asserted. *See, e.g., Loumar v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983) (doctrine prevents collateral attacks during pendency of lawsuit). *See generally* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4478 (1981).

cation, either by the district court on remand or by the appellate court in a subsequent appeal. *Conway v. Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1061-62 (5th Cir. 1981); *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 662-63 (5th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400 (1975). It is a restriction self-imposed on the courts to further the interests of judicial efficiency, and is based on the policy that issues once decided should remain so. An appellate court could not perform its duties satisfactorily and efficiently if every question it once considered and decided remained open for reexamination in subsequent proceedings in that same case. *Key v. Wise*, 629 F.2d 1049 (5th Cir. 1980) *quoting White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967). The doctrine, of course, does not bar consideration of any issue that might have been, but was not actually, resolved in the earlier proceeding. *United States v. Louisiana*, 669 F.2d 314 (5th Cir. 1982); *Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d 1164, 1169 (5th Cir. 1981), *cert. denied*, 455 U.S. 944, 102 S.Ct. 1441, 71 L.Ed.2d 656 (1982).

In this case, the issues previously decided on appeal were (1) that handwritten memoranda evaluating or commenting upon an employee's performance or conduct are "records" within the meaning of the Privacy Act, and (2) that if the memoranda were part of the basis for adverse action, they were subject to the timely placement requirements of section 552a(e)(5) of the Act. The controversy in this case stems from the court's remark that a "redressable violation" occurred. *Chapman*, 682 F.2d at 528.

We decline to hold that by using the phrase "redressable violation" this court previously intended to hold that

the government must pay damages to Chapman without further judicial examination of the issue of liability. What this court decided was that Chapman's complaint stated a claim under the Privacy Act. Nothing in the previous opinion suggests that the court intended to address or necessarily must have addressed the issue whether the government had the intent or willfulness necessary before a plaintiff may recover damages under the Act. *See* 5 U.S.C. § 552a(g)(4). Indeed, because the district court initially decided the Privacy Act issue on a legal basis that made specific factual findings unnecessary, this court could not have addressed the intent issue in the first appeal.[2] Intent is an issue of fact that belongs in the first instance to the trial court. Fed. R. Civ. P. 52(a).[3]

When, as here, the previous court's ruling is unclear or open to conflicting interpretations, we presume that the ruling was not erroneous and was otherwise in accordance with law. *Key v. Wise*, 629 F.2d at 1055 n. 4. We find support for applying this presumption to this case in

---

2. A factual issue, of course, could become the law of the case, but only if previously appealed and affirmed as not being clearly erroneous. *Cf. Goodpasture, Inc. v. M/V Pollux*, 688 F.2d 1003, 1006 (5th Cir. 1982), *cert. denied*, _____U.S._____, 103 S.Ct. 1775, 76 L.Ed.2d 347 (1983). This situation should not be confused with an exception to the "law of the case" doctrine which allows a subsequent court to decline to apply the doctrine if the holding in the previous opinion were clearly erroneous. *Id* at 1005. A factual issue coming within the "law of the case" doctrine by virtue of being affirmed on appeal would, of course, be subject to the clearly erroneous exception to the doctrine.

3. With the exception of *Goodpasture, Inc. v. M/V Pollux*, 688 F.2d 1003 (5th Cir. 1982), *cert. denied*, _____U.S._____, 103 S.Ct. 1775, 76 L.Ed.2d 347 (1983), discussed *supra* note 2, the other two cases upon which Chapman principally relies, *Morrow v. Dillard*, 580 F.2d 1284 (5th Cir. 1978), and *E.E.O.C. v. Int'l Longshoremen's Ass'n*, 623 F.2d 1054 (5th Cir. 1980), addressed purely legal issues that became the law of the case.

the language of our previous opinion which declined to make either a "qualitative" or "quantitative" analysis of the role of the improper records, *Chapman*, 682 F.2d at 528, and also in the fact that the court generally remanded the case "for further proceedings consistent [t]herewith." *Id.* at 530. Such general language suggests that the appellate court did not intend to decide a factual issue that was not within its province, or to "tie the lower court's hands in its task to a bedpost forcing it to stare only at the [issues specifically decided]." *Doran v. Petroleum Management Corp.*, 576 F.2d 91, 92 (5th Cir. 1978).

Chapman further urges that even if the law of the case doctrine is not applicable, he both pleaded and proved intentional or willful withholding of the handwritten records by NASA. On remand, the district court specifically concluded that "there is simply no evidence of any actions which could be construed reasonably as being either 'intentional' or 'willful.' " Our review of this factual determination is limited. We may overturn it only if we conclude that the district court's decision was clearly erroneous. Fed. R. Civ. P. 52(a). *See, also Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). While the inferences that might be drawn from the supervisor's withholding of the personal memoranda for almost two years when the Act and NASA's own internal rules both require that the maintenance of records be timely may call into question the district court's "simply no evidence" characterization, we do not find the district court's holding that Chapman had not proved willfulness or intent to be clearly erroneous.

Chapman urges that his supervisor willfully violated the requirement of timeliness by withholding notes that he

obviously knew existed, and then incorporating them into Chapman's record several months later, just prior to Chapman's dismissal. We do not agree that this conduct, without more, necessarily implies that NASA acted with the willfulness or "gross negligence," that is a prerequisite to recovery of damages under the Privacy Act. *Edison v. Department of the Army*, 672 F.2d at 846. NASA's internal rules allowed for handwritten memoranda to be incorporated into personnel records even before this court decided that issue in the first appeal of this case. Indeed, the first time the district court heard this case, it did not even think handwritten memoranda were "records" within the meaning of the Act.

While the handwritten memoranda could not have been excused from the "timely" incorporation requirement of the Act and NASA's own rules, before our previous opinion "timely" had no precise legal meaning in this circuit. NASA personnel reasonably could have thought that as long as the memoranda were placed in the file before they became the basis for adverse action, and as long as the employee had an opportunity to review them prior to challenging the agency's action, the incorporation was "timely." *Cf. Thompson v. Department of Transportation*, 547 F.Supp. 274 (S.D. Fla. 1982) ("contemporaneously with or within a reasonable time after an adverse disciplinary action is proposed"). Chapman has adduced no further evidence that his supervisor's failure to give the memoranda to the personnel supervisor immediately after writing them was inexcusable oversight, or that the supervisor had any unlawful intent or ulterior motive in keeping his memoranda private. We conclude that the district court's finding that the supervisor's actions simply fell

short of being intentional or willful within the meaning of the Act is not clearly erroneous.

The decision of the district court, therefore, is AFFIRMED.

Appellant's motion for attorney fees is DENIED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2058

WILLIAM B. CHAPMAN,
Plaintiff-Appellant,

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING

(August 15, 1984)

Before RUBIN, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ E. BRADY JOLLY
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-78-1539

WILLIAM B. CHAPMAN,
Plaintiff

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
Defendants

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS

* * *

The Administrative Procedure Act

Defendants contend that this Act does not afford an implied grant of subject matter jurisdiction permitting review of an agency action. Plaintiff agrees that the Act itself does not confer jurisdiction independent of other statutes, but maintains that it does, however, establish the scope of review of an agency decision when jurisdiction is properly established pursuant to some other statutory grant. It is, therefore, the Plaintiff's contention that since jurisdiction herein is proper under 42 U.S.C. § 2000 e-16 and 29 U.S.C. § 621, et seq., (federal employment and age discrimination statutes), the Administrative Procedure Act is remedial and establishes the scope of review.

Plaintiff's Complaint reveals that his cause of action centers around a claim of sex and age discrimination in employment. As a federal employee, the Plaintiff had a right to administrative review of his termination by the Civil Service Commission. See *Brown v. General Services Administration,* 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976). It is a review of the Civil Service Commission's opinion that the Plaintiff here seeks under the Administrative Procedure Act on the basis that the Commission's findings were not supported by substantial evidence, the Commission did not follow appropriate rules and regulations, did not use the proper level of proof or follow the appropriate statutes, and the Commission's decision is arbitrary, capricious, an abuse of discretion and not in accordance with law.

As a federal employee, the Plaintiff's cause of action for sex discrimination is governed exclusively by 42 U.S.C. § 2000e-16, *Id.,* and his cause of action for age discrimination is governed exclusively by 29 U.S.C. § 633a, *Christie v. Marston,* 451 F.Supp. 1142 (N.D. Ill. 1978). Plaintiff is entitled to a trial de novo under both of these statutes proscribing discrimination in federal employment. *Chandler v. Roudebush,* 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976); *Nabors v. United States,* 568 F.2d 657 (5th Cir. 1978). Therefore, review of the Civil Service Commission's findings is neither necessary nor appropriate herein and this Court has no jurisdiction to do so under the Administrative Procedure Act because there exists "an adequate remedy in a court" for the grievances of the Plaintiff. 5 U.S.C. § 704; *Hall v. Equal Employment Opportunity Commission,* 456 F. Supp. 695 (N.D. Calif. 1978); *Stewart v. Equal Employ-*

ment Opportunity Commission, 48 U.S.L.W. 2473, January 22, 1980 (7th Cir., December 28, 1979).

* * *

In accordance with this Memorandum and the stipulations of the Plaintiff in his response to the Defendants' motion to dismiss, the Court enters the following orders:

1. The causes of action alleged in Plaintiff's complaint under 42 U.S.C. §§ 1981, 1982, and 1983; 18 U.S.C. §§ 241 and 242; 5 U.S.C. § 701, et seq.; and the 5th Amendment (as an independent ground of jurisdiction only), are DISMISSED. Rule 12(b)(1), FED.R.CIV.P.

2. Defendants, Christopher C. Kraft, Richard S. Johnson, Michael B. Duke, William C. Phinney, and Robert F. Hall, are DISMISSED as Defendants in this action. Rule 12(b)(2), FED.R.CIV.P.

3. That portion of Defendants' motion which seeks dismissal of Plaintiff's cause of action under the Privacy Act, 5 U.S.C. § 552a, is DENIED.

SIGNED and ENTERED this 6th day of Feburary, 1980.

/s/ GEORGE E. CIRE
George E. Cire
United States District Judge